[FILED MAR 29 1993]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-6313
Non-Argument Calendar

D. C. Docket No. CR 90-00063-AH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ORLANDO HERNANDEZ-OVIEDO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama

(March 29, 1993)

Before KRAVITCH, HATCHETT and COX, Circuit Judges.

PER CURIAM:

Defendant Orlando Hernandez-Oviedo pled guilty to conspiracy to distribute and possess with intent to distribute cocaine in violation of 21 U.S.C. § 846. As part of the agreement, the United States dismissed all other counts, recommended that Hernandez receive credit for acceptance of responsibility, that he be sentenced at the low end of the guideline range, and would not move that the sentence be

enhanced as a second drug conviction. The agreement also provided that the United States would recommend a downward departure in sentencing if Hernandez cooperated by rendering substantial assistance to law enforcement agents.

On appeal, Hernandez claims that the government breached its duty of good faith and fair dealing when it failed to move for a downward departure. However, the record shows that when, at sentencing, Hernandez objected to the government's failure to file a downward departure motion pursuant to the agreement, the government explained that Hernandez had failed to provide useful and truthful information, and thus he did not provide "substantial assistance."

Under the guidelines, a court may depart downward if the government moves for a departure pursuant to U.S.S.G. § 5K1.1, although the "district courts have authority to review a prosecutor's refusal to file such a motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive." *Wade v. U.S.*, ___ U.S. ___, 112 S.Ct. 1840, 1843-44, 118 L.Ed.2d 524 (1992). Here, there was no allegation that the government had an unconstitutional motive. Moreover, based upon the record, we conclude that the district court did not err in determining that the government did not act in bad faith by failing to request a downward departure.

AFFIRMED.

[FILED DEC 12, 1991]

IN THE UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CRIMINAL NO. 90-00063-AH

USAO NO. 89-R0094
OCDETF NO. SE-ALS-018

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ORLANDO HERNANDEZ-OVIEDO,

Defendant.

PLEA AGREEMENT

COMES NOW the United States of America, by and through J. B. Sessions, III, United States Attorney for the Southern District of Alabama, and Charles A. Kandt, Assistant United States Attorney for said District, and the defendant Orlando Hernandez-Oviedo, by and through his counsel, Fred Schwartz and Steve Goldstein, and enter the following agreement pursuant to Rule 11(e) of the Federal Rules of Criminal Procedure:

1. Orlando Hernandez-Oviedo, having been advised of his rights related to having this matter tried before a federal jury, agrees to waive those rights and to plead guilty to Count One of the Indictment, filed on April 26, 1991, charging him with Conspiracy to Distribute and Possess

with Intent to Distribute Cocaine, in violation of Title 21, United States Code, Section 846. Orlando Hernandez-Oviedo understands that the maximum penalty which the Court may impose upon his plea of guilty to Count One of the Indictment is imprisonment for a period of life, a fine not to exceed Four Million dollars, a supervised release term of five years, and a Special Assessment of $50.00.

2. Orlando Hernandez-Oviedo understands that by pleading guilty, he waives his rights to continue to plead not guilty, to a trial by jury, to the assistance of counsel at trial, to confront, cross-examine, or compel the attendance of witnesses, to present evidence in his behalf, his privilege against self-incrimination, and the presumption of innocence. Orlando Hernandez-Oviedo also waives any and all rights under the speedy trial act and local rules.

3. Orlando Hernandez-Oviedo will pay the mandatory special assessment of Fifty and 00/100 ($50.00) Dollars before the time of sentencing.

4. Orlando Hernandez-Oviedo acknowledges that should he commit any federal or state criminal offense before sentencing, the United States will not be obligated to fulfill any provisions under this Agreement, as set out below.

5. In return for the above-described guilty plea, the United States will do the following:

a. The United States will move to dismiss Counts Four, Ten, Twelve, Fifteen and Sixteen of the Indictment in this matter;

b. The United States will recommend that the defendant receive the two level credit for acceptance of responsibility in the calculations of the defendant's sentencing guideline;

c. The United States will recommend to the Court that the defendant be sentenced at the low end of the sentencing guideline range determined for this defendant.

d. The United States will not move to enhance the sentence of the defendant by classifying this conviction a second or subsequent drug conviction; although it is understood any prior convictions will be considered and calculated within the sentencing guidelines.

f. The United States will not prosecute the defendant for any other offenses within the Southern District of Alabama which may have been committed prior to this agreement. Although the undersigned Assistant United States Attorney currently knows of no other pending investigation of this defendant in any other district, nor of any intent to indict this defendant in any other district, this plea agreement in no way bars the prosecution of this defendant by other federal districts for offenses committed in their districts.

6. Orlando Hernandez-Oviedo agrees to cooperate fully with law enforcement agents investigating federal law violations, said cooperation to include providing a full, complete and truthful statement regarding his knowledge of such activity, and testifying fully and truthfully if called as a witness before the grand jury or in any trial which might result from his cooperation. Should the defendant fail to cooperate fully, or should the defendant be untruthful on any material point in his statements or testimony, the Agreement will be considered breached and the United States will not be obligated to fulfill any provisions under this Agreement, as set out below.

7. The United States will not use any statements of the defendant, which were made pursuant to cooperation with the United States as set out in paragraph six above, against

the defendant at his sentencing or in any other prosecution of the defendant, unless the defendant should testify himself to the contrary of said statements, at which time any of said statements may be used to impeach the defendant or to prosecute him for perjury.

8. In return for the truthful cooperation of Orlando Herenandez-Oviedo, described in paragraph 6 above, if the cooperation amounts to substantial assistance in the investigation or prosecution of another person who has committed an felony offense, upon completion of said cooperation, the United States will move the sentencing court to depart downward from the low end of the sentencing guidelines sentence. All parties agree to move the court for the continuation of his sentencing until such time that he has had an opportunity to substantially complete his cooperation. The United States will move for a downward departure at the sentencing hearing pursuant to Section 5.K.1.1. of the Federal Sentencing Guidelines, with a recommendattion for a prison term of ten years.

The determination of "substantial assistance," and the subsequent motion for a downward departure or reduction shall not be dependant upon a conviction of another person resulting from the cooperation of Orlando Hernandez-Oviedo, but rather upon the his rendering substantial assistance. "Substantial assistance" is defined as substantial assistance in the investigation or prosecution of another person who has committed an offense. Orlando Hernandez-Oviedo's assistance will be evaluated by the Court, and any appropriate reduction shall be determined by the Court for reasons that may include, but are not limited to, the significance and usefulness of the assistance, the truthfulness, completeness and reliability of his assistance, the nature and extent of his assistance, and the risk and timeliness of the defendant's assistance.

9. Orlando Hernandez-Oviedo's [sic] understands that sentencing remains within the discretion of the court and that the defendant may be sentenced up to the statutory maximums stated in the Agreement. Furthermore, the fact that the United States may recommend a downward departure or a reduced sentenced in no way assures the defendant of a downward departure or a reduced sentence, as sentencing modifications are also within the sole discretion of the court.

10. Orlando Herenandez-Oviedo's [sic] acknowledges that no other promises of any type have been made to him with respect to the sentence in this matter other than as set forth in the Agreement.

The above is a full and complete recitation of the Plea Agreement in this case. There have been no other promises or agreements expressed or implied. The defendant acknowledges that he enters the Plea Agreement freely and voluntarily and with advice and concurrence of his counsel.

DATED this 12th day of December, 1991.

/s/ ORLANDO HERNANDEZ-OVIEDO
Orlando Hernandez-Oviedo
Defendant

/s/ STEVE GOLDSTEIN
Steve Goldstein
Attorney for the Defendant

/s/ FRED SCHWARTZ
Fred Schwartz
Attorney for the Defendant

/s/
Charles A. Kandt
Assistant United States Attorney